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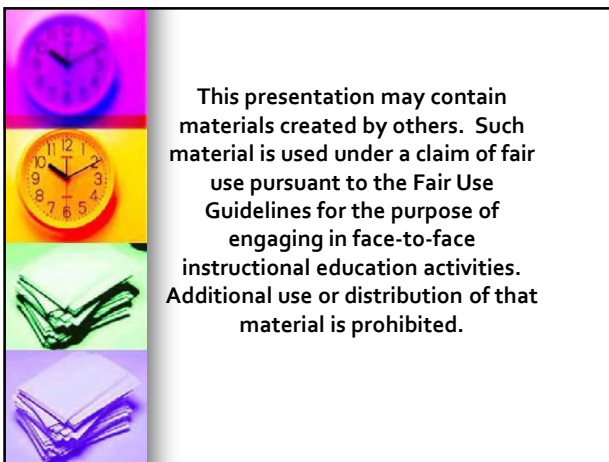
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### ER 3.8

The prosecutor in a criminal case shall:

(d) **make timely disclosure** to the defense of **all evidence or information** known to the prosecutor that tends to **negate the guilt** of the accused or **mitigates** the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all **unprivileged mitigating information** known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal

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### ER 3.8(d) Comment 3

. . . a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

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### Ethical Duties Under Rule 3.8(d)

- **Prosecutors must disclose**
  - Some non-admissible evidence
  - Some unreliable evidence
  - Evidence and information that might lead to a more lenient sentence
  - Evidence that would assist with defenses that defense counsel has not raised or thought of

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**Duty to Disclose May Be Greater Under the Ethical Rules**

- “[T]he ethical obligation is more demanding than the constitutional obligation.”

*American Bar Association Formal Opinion 09-454, July 8, 2009*

**ABA** AMERICAN BAR ASSOCIATION  
Defending Liberty, Pursuing Justice

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**Mitigating Material & Information**

- ***Shall make available***
  - “All then existing material or information which tends to mitigate or negate the defendant’s guilt as to the offense charged, or which would tend to reduce the defendant’s punishment therefore.”

*Crim. Proc., Rule 15.1(b)(8)*

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**State’s Duty to Disclose**

Any material evidence which would tend to reduce or negate the defendant’s guilt *must* be disclosed.

*Brady v. Maryland, 373 U.S. 83 (1963).*

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### Favorable Evidence Must be Disclosed

- The prosecution is duty bound to disclose evidence favorable to the defense whether or not defendant requests it.

*State v. Altman*, 107 Ariz. 93 (1971).

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### State's Automatic Duty to Disclose

- Rule 15.1(b) – must make available if in our possession or control
  - names, addresses, written/recorded statements of witnesses intend to call;
  - any statements made by the defendant
  - law enforcement reports
  - experts and their results;
  - list of evidence to be used at trial
  - defendant's prior felony convictions or bad acts intend to use
  - any information which tends to negate the defendant's guilt, or would reduce the defendant's punishment
  - wire taps
  - search warrants
  - Informants who will testify

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### Discovery Deadlines

- Superior court - 30 days after arraignment
- Limited Jurisdiction Courts – at the first pretrial conference

*Crim. Proc.*, Rule 15.1(c)

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### Initial Felony Disclosure

- At arraignment or preliminary hearing
  - Must make available law enforcement reports & examining expert's names, addresses & completed results

*Crim. Proc., Rule 15.1(a)*

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### Felony Priors Must Disclose:

- List of prior felony convictions of State's witnesses
- List of prior felony convictions intend to use for impeachment
  - **Deadlines** (felony 30 days before trial or after defense request; misdemeanor 10 days before trial)

*Crim. Proc., Rule 15.1(d)*

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### Only if Defendant Requests

(Within 30 days)

- 15.1(e) - Make available for examination, testing & reproduction
  - Evidence listed in initial discovery 15.1(b)(5)
  - Existing case 911 calls
  - "Completed written reports, statements and examination notes made by experts"

May impose reasonable conditions

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***But see, State v. Roque, 213 Ariz. 193 (2006)***

Rule 15.1 (a)(3) applies even if expert did not write down results of tests and examinations if results are known to the state.

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**Court Ordered Additional Disclosure**

- Defendant must show
  - **Substantial** need
  - **Unable** without undue hardship to obtain substantial equivalent

*Crim. Proc. Rule 15.1(g); State v. Tankersley, 191 Ariz. 359 (1998); State v. Kevil, 111 Ariz. 240 (1974).*

- Rule also considers whether request is "unreasonable or oppressive."

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**Not Subject to Disclosure**

- Work product
  - prosecutor
  - legal or investigative staff
  - law enforcement
- Informants who will not be called
  - If risk to informant's life or effectiveness & will not infringe constitutional rights

*Crim. Proc. Rule 15.4(b)*

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**Prosecutor's Obligation Extends to Material & Info in the Possession or Control of:**

- prosecutor
- prosecutor's staff
- law enforcement
  - who participated in the investigation &
  - under the prosecutor's direction or control
- any person
  - who participated in the investigation/evaluation &
  - under the prosecutor's direction or control

*Crim. Proc., Rule 15.1(f)*

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**Not Under the State's Control**

- Material in the possession of the victim - even if the victim cooperates with prosecution.  
*State v. Kevil*, 111 Ariz. 240 (1974); 2003 Rule 15.1 comment.
- A witness does not become the agent of the prosecutor merely by cooperating with the police.  
*State v. Piper*, 113 Ariz. 390 (1976).

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**Not Under the State's Control**

Just because prosecution is in a better position to obtain a witness's cooperation does not mean that the witness is under the State's control.

*State v. Bernnini (Daughters-White, RPI)*, 220 Ariz. 536 (App. 2009).

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### Not Under the State's Control

Generally don't have to obtain & disclose information & material held by federal agencies.

*State v. Briggs*, 112 Ariz. 379 (1975).

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### Defense Disclosure Requirements

- Defense must provide
  - written notice of all defenses
  - names, addresses, & statements of defense witnesses;
  - names, addresses & results of expert's examination & tests
  - list of all evidence to be used at trial.

*Crim. Proc. Rule 15.2(b) & (c)*

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### Upon Written Request

(within 30 days)

- Defense Shall make available:
  - Papers, documents, photos, & objects to be used at trial
  - Expert's completed written reports, statements & examination notes

*Crim. Proc. Rule 15.2(e)*

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**At any time upon written request the defendant shall:**

- Appear in a line-up
- Speak for ID by a witness
- Be finger, palm or voice printed
- Pose for Photos
- Try on clothing
- Permit the taking of hair, blood, etc. samples
- Provide handwriting samples

*Crim. Proc. Rule 15.2(a)*

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**At any time upon written request the defendant shall:**

- ★ Submit to a reasonable, physical or medical inspection of his or her body
  - HGN
  - Temperature
  - Tattoos
  - Scars
  - Etc.

*Crim. Proc. Rule 15.2(a)(8)*

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**Continuing Duty to Disclose**

- Each side is required to supplement discovery as new information becomes known.
  - Tox results
  - EMS reports
  - DNA
  - Psychological testing
  - medical records
  - 911 tapes
  - photographs, audio or videotapes
  - victim impact statements & restitution requests

16A ARS Rules of Crim. Proc., Rule 15.6

Be aware of what is coming in – or should be

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## Final Deadline

- Unless otherwise permitted:
  - Must be completed 7 days before trial

*Crim. Proc. Rule 15.6(c)*

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## Use of Materials

- All materials furnished under rule 15 “shall not be disclosed to the public but only to others to the extent necessary for the proper conduct of the case.”

*Crim. Proc. Rule 15.4(d).*  
(comments – “discovery materials are to be considered confidential records.”)

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## What if Defendant Fails to Disclose?

- The State's continuing duty to disclose ceases
- Except for *Brady* material

*Crim. Proc. Rule 15.7(c)*

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**Remember the Local Rules**

- Mohave County
- Pima County
- Pima County JP
- Pinal County
- Phoenix Municipal
- Yuma Municipal

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**Also Remember**

- Make Use of the Comments to the Crim. Proc. Rules
- Victim's Rights

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**Responding to Motions for Discovery & Sanctions**

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### Compel/Sanctions Motions

- Must comply with the Rules of Criminal Procedure
  - Must be in writing. *Crim. Proc.*, Rule 35.1.
  - Must be timely. *Crim. Proc.*, Rule 16.1(b).

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### Evaluate

- Is it something we were automatically required to disclose?
 

*Crim. Proc.*, Rule 15.1(a) & (b); ER 3.8; *Brady*

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### Evaluate

- Is evidence/material in State's control?
 

*Crim. Proc.*, Rule 15.1(f)
- Would it be burdensome to comply with the request?
 

*Crim. Proc.* Rule 15.1(g)

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## Evaluate

- Did the defense demonstrate:
  - **Substantial** need
  - **Unable** without undue hardship to obtain substantial equivalent

*Crim. Proc. Rule 15.1(g)*

- Is it available elsewhere or on-line?
- Does defense already have it?
- Do they have other & adequate means of challenging state's evidence?

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## On-line Disclosure

- [http://phoenix.gov/AGENCY/PHXPROS/blooddisclo\\_toc.pdf](http://phoenix.gov/AGENCY/PHXPROS/blooddisclo_toc.pdf)
- <http://phoenix.gov/phxpros.html>

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## Evaluate

- Is evidence/material work product?

*Crim. Proc., Rule 15.4(b)*

- Is it privileged or confidential?
- Do we need a protective order?

*Crim. Proc., Rule 15.5, ER 3.8(d)*

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## Evaluate

- Do we need to redact the items to be disclosed?
- Is this a fishing expedition?

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## Evaluate

- Do we need to redact the items to be disclosed?
- Is this a fishing expedition?

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## Motion for Sanctions

- Court may not consider or set for hearing unless provided a separate statement certifying:
  - Personal consultation &
  - Good faith efforts to resolve the matter

*Crim. Proc., Rule 15.7(b)*  
*Local Rules - Mohave CR-8; Pinal County 2.3 (must confer & include statement)*

**Remember if you request sanctions**

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### Motions for Sanctions

Parties must make good faith efforts to resolve discovery disputes.

If court imposes a sanction (such as a continuance) a party may not simply decline it hoping court will substitute a more stringent one.

*Roque, supra.*

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### Discovery Sanctions

■ The court shall order disclosure & may:

- grant a continuance
- hold a party in contempt
- preclude or limit a witness's testimony, use of evidence or argument
- declare a mistrial to prevent a miscarriage of justice
- Dismiss with or w/o prejudice
- Impose costs of continuance

*Crim. Proc., Rule 15.7(a)*

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### Discovery Sanctions

■ The court shall order a sanction unless:

- failure to comply was harmless
- the info. could not have been disclosed earlier with due diligence & was disclosed immediately upon its discovery

*Crim. Proc., Rule 15.7(a)*

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**Court “shall” take into account:**

- Significance of information
- Impact on party & victim
- Stage of the proceedings

*Crim. Proc., Rule 15.7(a)*

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**Court Should Consider**

- Reasons for late disclosure
- How vital evidence is to the proponent’s case
- Prejudice to opposing party
- Bad faith or willfulness
- Feasibility of rectifying the prejudice with a continuance.

*State v. Roque, 213 Ariz. 193 (2006).*

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**Court Should Consider**

- Importance of witness or evidence
- Level of surprise
- Bad faith

*State v. Payne, supra.*

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### Sanctions

All sanctions must be  
“proportional to the violation and  
must have ‘a minimal effect on  
the evidence and the merits.’”

*State v. Payne*, 314 P.3d 1239  
(2013).

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### *State v. Payne*

- Court's preclusion of defense psychologist upheld when:
  - Defense did not disclose Dr. report
  - State discovered it after trial had started
  - 2 weeks later & less than 2 days before penalty phase, defense disclosed Dr. as witness

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### Case Law for Responses

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Discovery in criminal cases is much more limited than in civil cases.

*State v. Towery*, 186 Ariz. 168 (1996).

Mere fishing expeditions are not to be countenanced!

*State ex rel. Corbin v. Superior Court*, 105 Ariz. 465 (1968); *State v. Wallace*, 97 Ariz. 296 (1965).

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**Fishing Expeditions**

Defendant's request for all police reports and other info. Regarding any disturbances at an apartment building was mere conjecture and a "fishing expedition."

*State v. Hatton*, 116 Ariz. 142 (1977).

See, *State v. Bernstein (Herman, RPI)*, No. 1 CA-SA 12-0226 (unpublished).

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**Disclosure of Scientific Evidence**

Rule 15.1(b)(4) only requires the state to disclose completed tests or examinations.

Sanctioning for the state's failure to disclose incomplete test results was an abuse of discretion.

*State v. ex rel. Thomas (Milagro, RPI)*, 221 Ariz. 112 (App. 2009); *State v. Simon*, 229 Ariz. 60 (App. 2012).

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**Source Code**

Trial Court abused its discretion by ordering the State to obtain & produce source code for Intoxilyzer 8,000.

*State v. Bernini (Daughters-White, RPI)*, 220 Ariz. 536 (App. 2009) ; & *Daughters-White II*, 222 Ariz. at 610.

A.R.S. 28-1323(C)

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**Source Code**  
**A.R.S. 28-1323(C)**

Inability to obtain schematics or software for breath test instrument does not preclude admission of test results.

*See also, State v. Lindner*, 227 Ariz. 69 (App. 2010).

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**Great Case!**

- Trial court's order to allow defense to observe & record crime lab's operations was an abuse of discretion

*State v. Fields (Rosengren, RPI)*, 196 Ariz. 580 (App. 1990).

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**Fields**

“Information is not discoverable unless it could lead to admissible evidence or would be admissible itself.” 196 Ariz. at 582.

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**Fields**

Defense failed to demonstrate:

- The test results in question are inaccurate
- how or if the lab deficiencies affected their test results
- an indication of admissible evidence expect to find

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**Fields**

“Without showing need or concerns regarding accuracy “the motion to compel “can only be viewed as ‘fishing expedition,’ which the rules do not permit.” 196 Ariz. at 583.

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### What if I Lose?

- Comply
- Ensure your record is good
- Special Action
- Appeal – constitutional or dismissed?

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**Beth Barnes**  
GOHS AZ Traffic Safety Resource  
Prosecutor  
[beth.barnes@phoenix.gov](mailto:beth.barnes@phoenix.gov)



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